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## The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory

Jan M. Smits\*

### 1. Introduction

Alan Watson has provided us with abundant and beautiful evidence that “most changes in most systems are the result of borrowing”.<sup>1</sup> But as a legal historian and comparative lawyer, Watson has not only been concerned with showing the importance of legal transplants. He has also emphasised the need for study of “the nature of legal development”.<sup>2</sup> Evolutionary theory – or any theory whatsoever – he however considers as too general for this purpose:<sup>3</sup> “There is no equivalent of the ‘invisible hand’ of economics that under perfect conditions would keep a balance between supply and demand”.<sup>4</sup> Yet, one need not go so far as to contend that a theory of legal development should be applicable to *all* societies for *all* time and then reject such a theory as being too general to explain the evidence that is present. In the following, I intend to make use of evolutionary theory to obtain a better insight into the present debate on harmonisation of private law in Europe and the changes this may bring to Europe’s national legal systems. I consider this to be a fertile approach: in a time when evolutionary ideas are increasingly used in various disciplines (biology, economics, psychology, linguistics, etc.), legal science cannot stay behind.

This paper presupposes a specific theoretical framework that is made explicit in section 2. In section 3, the insights comparative law studies have provided us with regarding the way legal systems develop, are surveyed. From there, the perspective changes to some other disciplines and the experience these can provide us with in the domain of evolution of legal norms (section 4). On the basis of this experience, some remarks on the future of European private law will be made (section 5).

### 2. Theoretical Framework on the Possibility of Uniformity in European Private Law

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\* Professor of European Private Law, Maastricht University.

<sup>1</sup> ALAN WATSON, *LEGAL TRANSPLANTS* 95 (1974).

<sup>2</sup> See WATSON, *supra* note 1, at 7. Cf. ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977); Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978); cf. R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991).

<sup>3</sup> WATSON, *supra* note 1, at 13 Cf. however the general reflections, at 95, stemming from his survey of evidence. Cf. ALAN WATSON, *THE EVOLUTION OF LAW* (1985).

<sup>4</sup> WATSON, *supra* note 1, at 108.

The theoretical framework this paper presupposes<sup>5</sup> is that uniformity of law in most of the cases cannot be created by just the imposition of rules in a centralist way. Private law is – at least to some extent – more than just rules and could at least to some degree be considered as part of a national legal culture.<sup>6</sup> Would this be different, there would not be a need to assess any organic evolution of legal norms, other than the evolution of legislation itself<sup>7</sup>; law would then be nothing but a positivist artefact of some Sovereign. Moreover, it would not be a question anymore whether it is possible to predict the extent of uniformity that can be created in the future because this would then follow automatically from the famous “berichtigende Worte des Gesetzgebers”.<sup>8</sup> Two different claims are immanent in this presupposition.

The first one is that the mere drafting and enacting of “Principles” of European private law<sup>9</sup> does not in itself lead to uniformity. Private law is to a certain extent harmonisation resistant, even when confronted with centrally imposed rules. To which extent this is the case, is a question this paper intends to shine a brighter light on. Too radical however is the contention of Pierre Legrand that “legal systems (...) have not been converging, are not converging and will not be converging.”<sup>10</sup> Legrand’s idea of law as entirely embedded in the society and culture of a specific country has not been recognised as insightful.<sup>11</sup> Moreover, Legrand’s idea of comparative law would by many comparative lawyers not be recognised as falling within the limits of that discipline at all. F.H. Lawson for example once stated that comparative law is in itself “bound to be superficial”; linking law to other societal and cultural phenomena of a specific country would be impossible.<sup>12</sup>

The second claim I implicitly make, is that a greater extent of legal uniformity than exists right now is possible, but should to a large extent come about in an *organic* way. This opens up a whole variety of research themes, related to other disciplines than the law and aiming at the study of cases where organic, spontaneous, orders have originated through evolution and not by creation. I previously defended that the best way of unification of law in Europe would be through a competition of legal rules.<sup>13</sup> In transplanting legal rules from one country to another on a “market of legal culture”,<sup>14</sup> the best legal rule for Europe may survive. This does not automatically imply that *any* rule glorifies: in some instances, diversity of law may be just as good as uniformity as long as there is a free movement of legal rules, at least creating the *possibility* of legal change. Some of the questions this theory presents us with (When will uniformity prevail? Which rule is the best to survive? Is that rule the result of a “race to the bottom” or not? Are there differences in

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<sup>5</sup> An elaboration of this framework can be found in JAN SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW* (2002).

<sup>6</sup> For the most outspoken defence of this thesis, see PIERRE LEGRAND, *LE DROIT COMPARÉ* (1999).

<sup>7</sup> As has been investigated by R.C. Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90 (1977) and R.C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981).

<sup>8</sup> JULIUS VON KIRCHMANN, *DIE WERTLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT* (1848), 89.

<sup>9</sup> Cf. in particular *PRINCIPLES OF EUROPEAN CONTRACT LAW* (Ole Lando & Hugh Beale eds., 2000).

<sup>10</sup> Pierre Legrand, *European Legal Systems are not Converging*, 45 INT’L & COMP. L.Q. 52, 61-62 (1996).

<sup>11</sup> Cf. ALAN WATSON, *LEGAL TRANSPLANTS AND EUROPEAN PRIVATE LAW* (Ius Commune Lectures No. 2, METRO 2000).

<sup>12</sup> F.H. Lawson, *The Field of Comparative Law*, 61 JURID. REV. 16 (1949).

<sup>13</sup> Jan Smits, *A European Private Law as a Mixed Legal System*, 5 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW [M.J.] 328 (1998).

<sup>14</sup> Cf. Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 1994 INTERNATIONAL REVIEW OF LAW AND ECONOMICS [I.R.L.E.] 3.

the extent that various areas of a discipline are touched by the evolutionary process?) may be provided with a preliminary answer in this paper, partly building on other disciplines.

### 3. Some Traditional Points of View on Legal Change

It is surprising to see how little study has been made of the process of legal change. Anyone interested in the process of unification of law in Europe should be aware of the historical evidence that is present within legal systems and that shows how a legal system copes with changes in society as a whole and which rules are better prepared for those changes than others. The explanation for this lack of interest is undoubtedly caused by the positivist stance that private law studies have taken in Europe ever since the enactment of national Civil Codes (which may also explain why the evolutionary tradition is much stronger in Anglo-American jurisprudence). Since then, private law is merely looked at as a design *choice* of a Creator, not as an organism shaped by its environmental conditions.

The evolutionary tradition in law that does exist is mainly related to authors opposing codification (like Savigny) or authors from the Anglo-American tradition. The most powerful application in law of evolution theory on the European continent still is the work of Savigny and his Historical School, propagating an “organically progressive jurisprudence”, law being part of the *Volksgeist*.<sup>15</sup> Savigny’s view is however much too vague to be regarded as a true scientific theory of legal change.<sup>16</sup> Maine does offer such a theory,<sup>17</sup> although he looks at the evolution of the legal system as a whole and not so much at the evolution of legal rules *within* that system. Several other authors – influenced by the publication of Darwin’s *On the Origin of Species* in 1859 or not – have offered theories on the evolution of legal institutions,<sup>18</sup> though without taking advantage of the insights of other disciplines.<sup>19</sup>

Neither of a very precise nature are the traditional comparative law efforts to explain *why* legal transplants take place. As factors, involved in the taking place of legal transplants,<sup>20</sup> have been mentioned the prestige or quality of the exported legal rules,<sup>21</sup> efficiency,<sup>22</sup> the role of the national *élite*,<sup>23</sup> chance,<sup>24</sup> practical utility,<sup>25</sup> cultural forces<sup>26</sup> and imposition.<sup>27</sup> These very diverse

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<sup>15</sup> F.C. VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (photo. reprint 1967) (1814).

<sup>16</sup> Cf. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 43 (1985): “by modern standards Savigny’s work seems hopelessly metaphorical and unscientific”.

<sup>17</sup> H.J. SUMNER MAINE, ANCIENT LAW (1861).

<sup>18</sup> For an excellent overview, see Elliott, *supra* note 16, at 38. Cf. P. STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA (1980).

<sup>19</sup> See, however, the writings of Clark, cited *supra*, note 7 and Roe, cited *infra*, note 48.

<sup>20</sup> Cf. ESIN ÖRÜCÜ, CRITICAL COMPARATIVE LAW 121 (1999).

<sup>21</sup> For the traditional explanation, cf. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995) and Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 333, 345 (1996), stressing “the need for authority”.

<sup>22</sup> See in particular Mattei, *supra* note 14, at 3.

<sup>23</sup> P.G. Monateri, *The ‘Weak’ Law: Contaminations and Legal Cultures*, in ITALIAN NATIONAL REPORTS TO THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, 94 (1998).

<sup>24</sup> Alan Watson, *supra* note 21, at 339.

<sup>25</sup> Alan Watson, *supra* note 21, at 335.

factors may indeed explain *why* legal transplants take place, but a concrete relationship between these factors and the way legal systems change is absent. What we need, is a theory that can explain the examples of legal transplants that Watson provides us with. Could interdisciplinary evolutionary theory be of use here?

#### 4. Some Insights from Evolutionary Biology and Economics

The most well known application of evolutionary theory is – of course – to be found in biology.<sup>28</sup> According to classical Darwinism, evolutionary change takes place through natural selection. The individual members of a species organise their lives to produce the most surviving offspring and in doing so, they necessarily adapt themselves to changing circumstances.<sup>29</sup> The descent of one or more trees of life thus leads to a diversity of species through speciation, extinction and the evolving of new characteristics within these species. In Darwinism, this process of evolution by natural selection presupposes three requirements.<sup>30</sup> First, there must be variation in the species (otherwise there would be no species that could better survive than others); second, the variation must concern variation in fitness (understood as the ability to survive and reproduce, some species being more able to adapt themselves to changing circumstances than others), third the characteristics that are constituent for the fitness of the species must be inherited (otherwise, there could be no evolution of the species as such). Only with these three constituents, a “struggle for life” can originate.

As to the evolution of legal rules in Europe, it is possible to transplant the first two of these requirements: also in European private law, different rules exist as to the solving of identical cases and presumably not all of these rules are as “fit” as others to carry out their task. Much of the present day rules in the various European countries are the result of a long evolution, adapting them to the environment these rules had to operate in. According to evolutionary theory, other rules that once existed in these countries must have been eliminated in this process of natural selection and any change of the environment in the future would – again – lead to adaptation of the present rules. The third requirement of Darwinism (the inheritability of characteristics) is more problematic in the context of law because of the simple fact that descendants that take over the genes of the previous species do not exist. As we shall see, however, other disciplines that make use of evolutionary analysis (in particular economics) solve this problem by identifying analogues of genes.

Apart from these constituents of evolution, theoretical biology distinguishes between the different possible causes of evolution. In this respect, natural selection is only one of them, alongside with mutation, migration, recombination and mating.<sup>31</sup> What is important for the

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<sup>26</sup> Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, 114 LAW QUARTERLY REVIEW [L.Q.R.] 228 (1998).

<sup>27</sup> As is rightly stressed by Esin Örüçü, *Mixed and Mixing Systems: a Conceptual Search*, in 349 STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Esin Örüçü et al. eds., 1996).

<sup>28</sup> Cf. on evolutionary biology ELLIOTT SOBER, *PHILOSOPHY OF BIOLOGY* (1993); J. MAYNARD SMITH, *THE THEORY OF EVOLUTION* (1993) and DOUGLAS J. FUTUYMA, *EVOLUTIONARY BIOLOGY* (3rd ed. 1998).

<sup>29</sup> William H. Rodgers, *Law and Biology*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, VOL. II 451 (1998).

<sup>30</sup> SOBER, *supra* note 28, at 9.

<sup>31</sup> *Id* at 18.

purpose of this contribution, is the discussion on what actually causes evolution (“Why do polar bears have white fur and other bears brown fur?”). This discussion on what is called *adaptationism* is about the importance of natural selection in the process of evolution. What is the actual power of natural selection?<sup>32</sup> The question is important for the evolution of law because it may give us some insight into the question why it is that some legal rules survive and others do not. Biology teaches us that as to the direction of the evolution, *adaptation* is the main principle. Organisms fit themselves into niches of viability offered by their environments. They have to in order to survive the pressure of selective competition from other organisms. What may be of interest for the study of law is that the direction of adaptation is usually toward simplicity, in particular when homogenisation of the environment reduces the number of distinct niches available. The movement is toward complexity when there are only a few species that proliferate within a new environment with many unfilled niches.<sup>33</sup> I will come back to this point later.

Theoretical biologist Sober provides us with a good insight into another discussion.<sup>34</sup> To predict what the mechanism of evolution leads to, it is possible to make use of simple models of the selection process (for example in case of the evolution of running speed in zebras, fast zebras may survive over slow zebras), taking into account only natural selection and not mutation or other evolutionary processes and abstaining from the fact that running speed may not evolve independently of other characteristics the zebra has. Adaptationists would say that any refinement of the simple model does not affect the prediction of how the running speed would evolve. If this were also true for the law, it would mean that selection of legal rules is a straightforward process, not hampered by other factors than the pursuit of finding the best rule available. As we shall see, however, this is not the case in the real world.

As Darwin intended a theory on how life evolves, other scholars have expanded his theory to other disciplines. Among these are history,<sup>35</sup> psychology,<sup>36</sup> political science,<sup>37</sup> history of science,<sup>38</sup> sociology,<sup>39</sup> ethics,<sup>40</sup> linguistics<sup>41</sup> and economics. In this section, I will focus on evolutionary economics.<sup>42</sup> Also in this application of evolutionary theory, the idea of an

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<sup>32</sup> *Id* at 119.

<sup>33</sup> Jack Hirshleifer, *Evolutionary Models in Economics and Law*, in *EVOLUTIONARY ECONOMICS* 205 (Ulrich Witt ed., 1993).

<sup>34</sup> SOBER, *supra* note 28, at 119.

<sup>35</sup> *THE RETURN OF SCIENCE: EVOLUTIONARY IDEAS AND HISTORY* (David Gary Shaw & Philip Pomper, eds., 1999).

<sup>36</sup> HENRY PLOTKIN, *EVOLUTION IN MIND: AN INTRODUCTION TO EVOLUTIONARY PSYCHOLOGY* (1997).

<sup>37</sup> F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973-1979).

<sup>38</sup> KARL R. POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* (1979).

<sup>39</sup> On the influence of Herbert Spencer *cf.* GEOFFREY M. HODGSON, *ECONOMICS AND EVOLUTION* 81 (1993).

<sup>40</sup> On socio-biology and the claims it makes about explaining morality, *cf.* SOBER, *supra* note 28, at 202; *see* notably the groundwork laid by E.O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975) and R. ALEXANDER, *THE BIOLOGY OF MORAL SYSTEMS* (1987).

<sup>41</sup> For an overview *cf.* JOHN MAYNARD SMITH & EORS SZATHMARY, *THE ORIGINS OF LIFE: FROM THE BIRTH OF LIFE TO THE ORIGIN OF LANGUAGE* (1999); J. MAYNARD SMITH, *EVOLUTION AND THE THEORY OF GAMES* (1982); JOHN H. BECKSTROM, *DARWINISM APPLIED: EVOLUTIONARY PATHS TO SOCIAL GOALS* (1993).

<sup>42</sup> The extensive literature on evolutionary economics includes GEOFFREY M. HODGSON, *EVOLUTION AND INSTITUTIONS: ON EVOLUTIONARY ECONOMICS AND THE EVOLUTION OF ECONOMICS* (1999); Witt (ed.), *supra* note 33; HODGSON, *supra* note 39. On the relationship with biology *cf.* John Foster, *Biology and Economics*, in *THE ELGAR COMPANION TO INSTITUTIONAL AND EVOLUTIONARY ECONOMICS* A-K 23

unalterable human nature or of a conscious design is abandoned for the idea that “selection by the environment”<sup>43</sup> should be the starting point for any analysis of a social or economic order. It is a programmatic contention that some patterns have survived because they were able to be adapted to environmental circumstances.<sup>44</sup> There is however dispute as to the existence of real evidence for this idea. In neo-classical economics, this evidence is for example provided in the sense that only those firms that maximise profit survive the process of market selection. Neo-classical analysis – excluding uncertainty anyway<sup>45</sup> – assumes this is the case because of deliberate choices made by these firms, and usually adds to this that in evolutionary theory the natural selection process mimics rational decision making.<sup>46</sup> “Market selection will produce rational market behaviour even if firms display irrational behaviour.”<sup>47</sup>

Would this be true for the law as well, it would be an important point for the analysis of European private law. The rough transplantation of this idea to law would mean that even if the legislature decides to enact legislation by deliberate choice, subsequent selection of rules on the market of legal culture would produce the same results. It is however disputed if neo-classical analysis is right at this point. Evolutionary theory makes clear what the significance is of “path dependence” in evolutionary processes. Roe has applied this to the law.<sup>48</sup>

The future time path the evolution is bound to take, depends on the “adaptive landscape” in which various factors such as environment conditions (like natural constraints) are at work. What should be the case to have a true spontaneous order evolve, is to have the external environmental conditions prevail. Many times, however, there are also internal materials (in organisms these would be genes) that have been shaped by transformations in the past that are now irreversible. These were responsive to the environment of those days, but are now constraints upon adaptive change.<sup>49</sup> The future development is thus affected by the path it has traced out in the past. In economic terms: an equilibrium will not originate, and this – as Hodgson puts it – is in contrast with the view that “real time and history could be safely ignored”.<sup>50</sup> In biology, especially Gould has pointed out that evolution many times depends on “accidents”, leading to an eccentric path,<sup>51</sup> like – in economy – the most efficient organisations may not come out on top because of now irreversible decisions that have been made in the past.<sup>52</sup> The lesson to be learnt from this for the law is that evolution of legal norms may not under all circumstances lead to the best result. The task that lies ahead is to find out where this strong path dependence has had a formative influence on the law of the various European countries.

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(Geoffrey Hodgson et al. eds., 1994); R. NELSON & S.G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* (1982).

<sup>43</sup> Elliott, *supra* note 16, at 60.

<sup>44</sup> Cf. Jack J. Vromen, *Evolutionary Economics: Precursors, Paradigmatic Propositions, Puzzles and Prospects*, in *ECONOMICS AND EVOLUTION* 45 (Jan Reijnders ed., 1997).

<sup>45</sup> Cf. HODGSON, *supra* note 42, at 40.

<sup>46</sup> Cf. Vromen, *supra* note 44, at 45 on this discussion.

<sup>47</sup> G.S. Becker, *Irrational Behavior and Economic Theory*, 70 *JOURNAL OF POLITICAL ECONOMY* 1 (1962); cf. Vromen, *supra* note 44, at 46 and HODGSON, *supra* note 42, at 177: “the assumption of maximizing behaviour by individual firms is not necessary for the scientific purposes of prediction”.

<sup>48</sup> Cf. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 *HARVARD L.R.* 643, 667 (1996).

<sup>49</sup> Hirshleifer, *supra* note 33, at 205.

<sup>50</sup> HODGSON, *supra* note 39, at 204.

<sup>51</sup> STEPHEN J. GOULD, *WONDERFUL LIFE* (1989).

<sup>52</sup> HODGSON, *supra* note 42, at 204.

Another insight evolutionary economics provides us with, is that as to the third requirement of natural selection (the inheritability of characteristics), some analogy to genes is possible. Notably Nelson and Winter use *routines* as playing the same role in firms as genes do in organisms.<sup>53</sup> The routines of a firm establish a *stable identity* of the firm that endures over time *and* – just like genes – they *program* the behaviour of the firms. As long as the routine is profitable, firms stick to it. Here, again, it goes without saying that firms are usually not able to change these routines too fast. Vromen points out that this is consistent with evolutionary game theory, which emphasises that agents have fixed, unalterable behavioural strategies, but inconsistent with neo-classical economics which maintains that economic agents are able to respond in an optimal way to change of circumstances.<sup>54</sup>

Some of the insights of the previously mentioned disciplines have been incorporated into standard Law and Economics scholarship. Of course, the standard hypothesis there is that since people have a desire to eliminate costs, the law evolves toward legal rules that minimise social costs and thus increase economic efficiency.<sup>55</sup> This thesis on the evolution of legal norms is closely related to the more general assertion that the whole of the common law is efficient.<sup>56</sup> Rubin and Priest have pointed out<sup>57</sup> that since inefficient rules are more likely to be disputed in court, these rules change in the re-examination by the court, while other rules survive. Cooter and Kornhauser have added to this that evolution does not necessarily lead to only one surviving efficient rule, but to some equilibrium of best and worst legal rules, constantly competing for survival.<sup>58</sup> This would be in accordance with modern biology, in which it is recognised that nature may have very different solutions for one and the same problem.<sup>59</sup> The problem of path dependence however does not play an important role in present day Law and Economics scholarship. Roe<sup>60</sup> may be right that this is due to the important role that policy plays in this discipline: evolutionary ideas do not direct us toward some policy direction.

In the following section, I try to make use of these – admittedly eclectic – insights in trying to establish the factors that are decisive for the development of uniform private law in Europe.

## 5. Predicting Differences between Areas of Private Law in Europe

### 5.1 General Observations

What is the importance of the above for the venture of creating a uniform private law for Europe? The way I see it, uniform law in Europe primarily comes about by evolution of legal norms. If this

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<sup>53</sup> Vromen, *supra* note 44, at 52.

<sup>54</sup> Vromen, *id.* at 53.

<sup>55</sup> Paul Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

<sup>56</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

<sup>57</sup> For an overview, *see* the excellent survey by Elliott, *supra* note 16, at 62.

<sup>58</sup> R. Cooter & R. Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

<sup>59</sup> Elliott, *supra* note 16, at 70.

<sup>60</sup> Roe, *supra* note 48, at 667. Cf, however., Ugo Mattei & Fabrizio Cafaggi, *Comparative Law and Economics*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW*, VOL. I, 346 (1998).



is an apt qualification of the unification process, it is subject to the more general mechanisms and principles of evolution just described. First, some general observations that stem from the previous survey are appropriate for the purpose of this contribution. Then, I will elaborate some points in more detail.

First, the question should be put to what extent the three Darwinist requirements for a survival of the fittest are also applicable to European private law. In an evolutionary theory of European unification, the various national rules to solve similar problems may be regarded as the necessary variety of species. This variety has come about through differentiation that started from one “tree of law” (some general concept of fairness from which the various rules originated). The second requirement as to the variation in fitness is met as well as long as it is presumed that not all the legal rules are as “fit” as others to carry out their task. Some rules may have been eliminated by the environment in which they had to operate; others may have survived because of their ability to adjust themselves to changing circumstances. The third requirement (inheritability of characteristics) is met if legal institutions are looked at as the “genes” of a legal system: the content of these institutions may differ as the identity of the institution as such remains the same (just like in economics, routines establish a stable identity of a firm). Just like new routines of firms are seldom entirely new, but most of the time combinations of old ones that guarantee that the specific identities of these firms are maintained,<sup>61</sup> the institutions that program the behaviour of the rules in response to the changing environment, maintain their specific identities as well. This idea calls for an application in the field of private law (section 5.2).

Secondly, evolutionary theory enlightens us regarding the possibility of the best rule surviving in a “struggle for life”. This is definitely not a straightforward mechanism. To predict which rules survive and which do not, one cannot just take efficiency or any other mono-explaining mechanism (the “simple model”) as a key-concept. Two different sorts of barriers to the emergence of the best legal rule should be taken into account. First, historically, the rule that has emerged may have been best adapted to the environment in which it had to function in the past. This has for a consequence that some rules may have been responsive to that past environment, at the same time eliminating the rules that were not adaptive in those days, but may have been the best rule for present times, if it had not been for their elimination. Selection on the market of legal rules does in this sense not produce the best available rules. Second, there is a future oriented aspect of this approach as well. Even if one is able to “reinvent” the rule that disappeared (and legal history can play an important role in doing so), it may be too costly to have that other rule prevail over the one we have become accustomed to. In this case of path dependence (the future development is affected by the path it has set out in the past), an equilibrium cannot evolve. “Accidents” may thus be just as important to explain the past and the future development of law. I will elaborate this idea with a view to the harmonisation process in different areas of private law in section 5.3.

Thirdly, it is fertile to look at legal rules as having a desire to reproduce themselves. This analysis may explain why it is that over time identical legal rules are often used for different goals. This “Funktionswandel” of a rule may indeed happen more frequently than the clear-cut elimination of a rule. As we saw that organisms fit themselves into “niches of viability offered by their environments”, legal rules want to survive as well in a changing society. It then is only because of the use of the same terminology or the embedment within the same institution that a stable identity remains (this point is related to the one discussed in section 5.2). Legal transplants

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<sup>61</sup> Vromen, *supra* note 44, at 53.

may – at least partly – also be explained by this mechanism. Moreover, it is interesting to find out to what extent the adaptation process in legal rules follows the same principle as in biology. If the direction of adaptation were indeed toward simplicity in case of homogenisation of the environment, it would be an indication of the direction private law would take in a unified Europe (*i.e.* the environment of a highly uniform economy). This biological idea is – the way I see it – very much related to the famous race to the bottom argument. Unlike the present debate about that argument – that is merely on a normative level – evolutionary theory is able to show us that this process may be inevitable in a changing economic environment (section 5.4). This argument may even be somewhat generalised with a view to the discussion on mentality as preventing a uniform European private law from coming about.

## 5.2 About the Way Private Law Rules Adapt to Changing Circumstances

For the venture of creating a uniform private law for Europe, it is interesting to see what *form* this law is bound to take. Evolutionary theory predicts that the external identity of institutions may very well stay the same while their contents differs. This result is consistent with what legal history shows us: concepts like contract, tort, property and marriage may *in name* remain identical, their content on the level of rules differs to a great extent over various periods of time. This combination of an “inherited” element and an element of variation guarantees that the adaptation of a rule to a new environment takes place in a not so overt way. To be more precise: a true *elimination* of one rule for another is not as likely as the *adaptation* of existing rules. Moreover, this adaptation or *mutation* of rules is not likely to happen in a stable evolutionary way. In biological evolution, the genes of a species are stable until there is a crisis (like an asteroid hitting the earth). It is only then that the species begins to mutate rather quickly and then either dies or adapts itself to the changed circumstances.<sup>62</sup> The species may then be extremely good adapted for the period of crisis (having the characteristics to survive that crisis), but not for the period thereafter.

This theory can be substantiated with the following. The environment in which most of the present legal rules in Europe have survived, has been an environment of a *national* legal system that was most of the time embedded in a *mixed market economy*. Most of the private law rules in continental Europe were able to survive because of their ability to adapt themselves to these characteristics. It is thus not much of a surprise that the surviving rules are the exponents of a liberal and individualistic model: in particular, they were extremely good adapted for the “crisis” of the French Revolution; these rules have subsequently been laid down in national civil codes. Freedom of contract, the liability for damages in case of fault and the absoluteness of property – including the rules originating from these concepts – thus have survived. To say that these concepts are well adapted for the present-day environment, is, however, hard to maintain. The many amendments that have been made to the rules emanating from these – indeed still under the same institutional heading – but in particular the importance that is attached to open ended norms (like good faith, reasonableness, negligence) in my view indicates that the present rules are now much less *normative* (and thus prescribing their future application) than they were at the time of the crisis they have survived.

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<sup>62</sup> Roe, *supra* note 48, at 663.

A good example of this phenomenon is the elimination of mechanisms that decide which promises are binding and which are not. *Causa* and *laesio enormis* served this particular purpose in the continental European private law systems before the great codifications.<sup>63</sup> They were eliminated in the codification process, or immediately after that, because of their uselessness in a system that put so much emphasis on the absolute bindingness of contracts. It would however have been fruitful to have these concepts available in a later period of time, when contract law had to find a mechanism for deciding which contracts have to be binding upon the parties and which are not. But in most European legal systems, courts were not able to refer to these concepts anymore: they now had to use other legal concepts (good faith, the reliance principle in contract law and so on) to reach the desired result. It was only in the common law that the requirement of consideration still could play the role of distinguishing between promises that were enforceable and those that were not – although even here this role has become diluted.

The coming into being of a common European market may very well be a new evolutionary crisis in the evolutionary sense. It is highly likely that – again – legal institutions will receive a different content while keeping their identity in a process of adaptationism. The new environment that is now emerging at high pace is the European environment of a *common* market, in contrast to the *national* environment of a *national* market that most of the rules have adapted themselves to. Joerges rightly points out that market integration leads to a rationalisation process in which all national law that constitutes an obstacle to the functioning of the internal market is under a pressure to change.<sup>64</sup> This calls for a survey of which areas of private law will be most affected by this process.

### 5.3 Path Dependence and Areas of European Private Law

It is usually held that the process of emergence of a common market only calls for the unification of those parts of the law that are vital to that market, namely contract law and parts of the law of property (in particular security interests).<sup>65</sup> From the evolutionary perspective that is chosen in this paper, we should however not be concerned with which parts are *to be* unified from a normative perspective, but – more descriptively – which parts are *most likely* to be affected by the changing environment.<sup>66</sup>

To decide to what extent uniformity of private law can come about in Europe, it is at first useful to follow Roe<sup>67</sup> in his concept of – what he calls – weak-form path dependence. This type of path dependence only explains what has survived; it does not entail that the survivor is better than another: “a society chose between two institutions and the choice became embedded, but the

<sup>63</sup> On this, see JAMES GORDLEY, *THE PHILOSOPHICAL FOUNDATIONS OF MODERN CONTRACT DOCTRINE* (1991).

<sup>64</sup> Christian Joerges, *The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines*, 3 EUROPEAN REVIEW OF PRIVATE LAW [E.R.P.L.] 179 (1995).

<sup>65</sup> Cf. Antonio Gambaro, *Perspectives on the Codification of the Law of Property: An Overview*, 5 ERPL 497 (1997); Andrea Bonomi, *La nécessité d’harmonisation du droit des garanties réelles mobilières dans le marché unique européen*, in L’EUROPÉANISATION DU DROIT PRIVÉ 497 (F. Werro, ed., 1998).

<sup>66</sup> I leave aside the view of Richard Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980), who defends the socio-biological thesis that those who follow rules of conduct have a better chance of surviving than others who do not.

<sup>67</sup> Roe, *supra* note 48, at 646.

chosen institution functions as well as the one discarded would have.”<sup>68</sup> A road may be built at the left bank of the river or at the right bank of the river, but the left bank is not any “better” than the right bank.

In case of this weak-form path dependence, there are no obstacles for harmonisation. The type of rules one would think of as touched by this form of path dependence, are those related to the more technical aspects of the law. Whether prescription periods or other time-related devices in the law are two years, five years or ten years is usually arbitrary. On the other hand, an evolution toward some “best” rule is not really feasible here either. Courts are usually not willing to reconsider these types of legal norms. In this case, harmonisation is therefore only possible through the imposition of a rule in a centralist way. In other words: the framework described in section 2 (uniformity as far as legal culture allows) is not inconsistent with a centralist imposing of law upon the various European countries.

It is not easy to identify the type of rules just described from other types of rules. Watson seems to see an important place for these arbitrary rules: “The truth of the matter seems to be that many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness”.<sup>69</sup> As far as the substantive parts of contract law, tort law and the law of property are concerned, I would rather not qualify these as examples of weak-form path dependence. The idea that it is indifferent which rule to adopt and that any evolution toward rules, better suited for some environment than others, is impossible, is not in line with the idea of these disciplines evolving to more efficient rules to the extent possible.

This is not to say that path dependence does *not* play a role in the traditional private law disciplines. To the contrary: other forms than weak path dependence<sup>70</sup> are certainly present. If we assume that the Europeanisation of private law presents a crisis in the evolutionary sense, the path already taken may thus prevent the best possible rules for the new European environment from evolving. Evolution leading to a great amount of uniformity is the least probable where it is only possible to change the present rules at the expense of high cost. This is the least the case with rules that many people rely upon; on the other hand, the amount of uniformity to be attained should theoretically be the most in the case of rules that are only of use for parties that set these rules themselves. Gambaro for example states the following about the law of real property:

When one considers the nature of various property rights (obligations between neighbours, riparian rights, condominium law, rights of superficies, servitudes, and the like), it becomes rather clear that much property law is deeply rooted in locally developed legal traditions. And, for this reason it is better left to those local legal traditions which for hundreds of years have addressed these issues in the manner most adapted to the locality.<sup>71</sup>

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<sup>68</sup> *Id.* at 647.

<sup>69</sup> WATSON, *supra* note 1 at 96.

<sup>70</sup> Roe, *supra* note 48 at 648 distinguishes between semi-strong path dependence (leading to inefficient paths that were once satisfactory but are now worth changing but are left intact). In case of strong-form path dependence, the situation is now inefficient and it would be efficient to change it. Here, political pressure groups or a lack of information about “the other way” prevents any change.

<sup>71</sup> Gambaro, *supra* note 65, at 497.

Gambaro is certainly right, but the reason why these rules are looked at as most adapted to the “locality”, has in my view more to do with the investments that have already been made in the path of property law and from which it is too costly to deviate, than with “the nature” of property rights. To change the national law in the areas mentioned by Gambaro, would mean that third parties’ interests have to be reconsidered on a very large scale. The reliance of the parties involved on the existence of “absolute” rights that have effect *erga omnes* would be violated if the applicable rules on, for example, the establishment of limited real rights and the registration of these rights would be eliminated or even changed. The taking into account of so many different interests has led to delicate static systems of property law with – most of the time – a *numerus clausus* of limited real rights.<sup>72</sup> Moreover, to get to know the ins and outs of property law in a specific system is far more difficult than to get to know a country’s law of contract: the information costs of the former are much higher.<sup>73</sup> In this sense, property law is indeed “stuck in a local equilibrium”. In the most part of property law, this does not pose a true problem: any need to have uniform law is virtually absent. It is a problem, however, where there *is* a need, namely in the field of security interests: here, the *desire* to create uniform law and the present *practice* as it has evolved in the past (adapted as it is to a national system of law) are the most divergent.

This is all different in case of the law of contract. The parties to a contract would not be truly hampered by a change of the law because of their ability to set the rules for their relationship themselves. The law of contract’s dynamic character guarantees the elimination and survival of rules that are respectively the least and the most suited for their new environment. Benson quotes Rubin as he says:

If conditions change (...) and two individuals decide that, for their purposes, behaviour that was attractive in the past has ceased to be useful, they can voluntarily devise a new contract stipulating any behaviour that they wish. That is, old custom can be quickly replaced by a new rule of obligation toward certain other individuals without prior consent of or simultaneous recognition by everyone in the group (or of some legal authority).<sup>74</sup>

This evolutionary idea is backed up by evidence from both the economic analysis of law and comparative law.

Economic analysis of law shows the need for a distinction between default and mandatory rules. This type of analysis makes clear that rules should be mandatory when any other rule that the parties would adopt would be violating third parties interests. Mattei and Cafaggi rightly point out that the amount of mandatory rules should decrease in a system where alternative means of protection of third parties are available. They mention for example the lesser amount of mandatory rules in contract law if the tort system protects third parties.<sup>75</sup> It is obvious that property law is much more related to these mandatory rules than contract law. The economic reason for property

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<sup>72</sup> Cf. SMITS, *supra* note 5, at 249.

<sup>73</sup> Cf. Meinrad Dreher, *Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa?*, 54 JURISTENZEITUNG 105, 109 (1999): “Da Wissen und Kosten eng miteinander verbunden sind, stellt Unwissenheit zumindest vor Informationskosten und begrenzt so auch die Faktormobilität ganz entscheidend”.

<sup>74</sup> Bruce L. Benson, *Evolution of Commercial Law*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, VOL. I, 90 (1998).

<sup>75</sup> Mattei & Cafaggi, *supra* note 60, at 348.

law being more mandatory runs parallel with the evolutionary idea of property law being less able to change when confronted with a changing environment.

Comparative law also provides us with evidence on the evolutionary thesis. Legal transplants in the field of contract law are far greater than in the field of property law. This may partly be due to private international law's *lex rei sitae* (accordingly there is no need to incorporate foreign property rights into one's own legal system), but it is certainly also due to the high costs of transplanting from another system in the case of property law and the much lesser costs in the case of contract and tort law. In the latter, legal transplants have been vigorous; the relative uniformity that already exists in the field of European contract law is undoubtedly caused by these transplants. In particular English law was to a great extent influenced by the civil law of the 19<sup>th</sup> century,<sup>76</sup> as continental European law is influenced in the late 20<sup>th</sup> century by the law of financial transactions on for example swaps, lease and franchising, coming from the common law world.

#### 5.4 The Race to the Bottom Argument and Evolutionary Theory

Finally, I will investigate whether evolutionary theory gives us some insight into the famous problem of the "race to the bottom", particularly of interest in company law. Competition of legal systems,<sup>77</sup> as opposed to a centralistic harmonisation, has for a consequence that companies are free to move from one state (or country) to another. In doing so, they will choose for the state (or country) with the lowest standards (like in the case of American company law the state of Delaware). The "home country control principle" subsequently guarantees that this low standard is exported to other states as well. What will evolve in the end, is a uniform law of the lowest standard. This race to the bottom may thus be said to arise when, "in a deregulated internal market, a state unilaterally lowers its social standards in an attempt to attract business from other states".<sup>78</sup>

The present debate on the race to the bottom-argument is mostly normative: usually, concerns are expressed about the lowering of standards through jurisdictional competition. The enactment of mandatory social legislation by the European Union even has as an explicit goal to avoid social dumping.<sup>79</sup> This contribution addresses the problem from a somewhat different angle: evolutionary theory may be able to show us to what extent a race to the bottom is inevitable in a changing economic environment.

As we saw in biology (section 4), the direction of adaptation of a species is toward simplicity in case of homogenisation of the environment and toward complexity when the environment still has many unfilled niches. If this were true for the evolution of private law as well, it would mean that homogenisation of the economic environment (that indeed originates

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<sup>76</sup> See THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 (Matthias Reimann ed., 1993).

<sup>77</sup> Cf. Norbert Reich, *Competition between Legal Orders: a New Paradigm of EC Law?*, 29 COMMON MKT. L. REV. 861 (1992); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377 (1997); Dreher, *supra* note 73, at 105 and Catherine Barnard, *Social Dumping and the Race to the Bottom: some Lessons for the European Union from Delaware*, 25 EUROPEAN LAW REVIEW 2000, 57-78 (2000).

<sup>78</sup> Barnard, *supra* note 77, at 57. This "jurisdictional competition" should be distinguished from the idea of *free movement of legal rules* (cf. Smits, *supra* note 13, at 328). The former is concerned with choosing some legal system, the latter with choosing some legal rule.

<sup>79</sup> Barnard, *supra* note 77, at 66.

within the European Union) leads to simple rules. This seems to confirm that the “race” is indeed one toward some common legal denominator. Barnard shows however that there is little evidence so far of this phenomenon in Europe.<sup>80</sup> She identifies six conditions that have to be met if a race to the bottom is to emerge. Among these conditions are a wide choice of different jurisdictions (like more than 50 legal systems in the United States) and full knowledge of each jurisdiction’s characteristics. These requirements are not met in Europe, where there are only 16 jurisdictions and where it is often difficult to obtain the necessary information about the respective legal systems.

From the evolutionary perspective, a race to the bottom is however likely to emerge if these two requirements are met in the future. As to the first requirement, the enlargement of the European Union with Eastern-European states would imply that the differences between the various systems could very well increase. A migration of companies toward systems with lesser standards than the present member-states is then likely to occur. In order to meet the condition of full knowledge of all the European jurisdictions, there is a need for more comparative law study. The only barrier for a true race to the bottom would be constituted by the minimum standards of law, set by the European Union’s directives and regulations. However: the fact that these standards are a barrier to evolution can also be explained by evolutionary theory: the path that has been traced out in the past, has – in Europe – been one of not only giving economic considerations the upper hand. A social policy has always been part of the European venture. In this sense, the investments already made in this policy would be too costly (perhaps not only in a social or cultural sense, but also in a financial sense in that it would entail large costs of changing the present legal position of workers, unemployed, and so on) to deviate from.

That not all of the present social guarantees in the European legal systems (namely those that guarantee *more* than the European minimum standards) will be kept intact, is however inevitable. Hayek is right when he stresses that legal rules may have come into being through historical accident, but that natural selection decides which rules are to survive. The natural selection process then chooses between competing groups of humans, letting survive those groups whose cultural norms and rules are more suited to efficiently coordinate social interactions.<sup>81</sup> The European venture of creating a common market then necessarily implies that it is the group of those who are best able to operate on that market whose rules will eventually survive. Worries about some “mentality” being strangled in this process are then not relevant anymore: that would be the irreversible consequence of an internal market coming about.

## 6. Closing Remarks

To predict to what extent the different areas of private law will evolve toward some uniform system is not an easy task. To adopt an evolutionary perspective on unification may however be useful. I do not contend that evolutionary theory is the only framework that provides us with explanatory predictions on how a European private law will develop, but it does provide us with some fruitful insights on the way legal rules adapt themselves to changing circumstances, on path dependence and on the probability of a race to the bottom. The mere fact that not all areas of

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<sup>80</sup> *Id.*, at 70.

<sup>81</sup> F.A. HAYEK, *Notes on the Evolution of Systems of Rules of Conduct*, in *STUDIES IN PHILOSOPHY AND ECONOMICS* 66 (1967); cf. the critical assessment by Viktor Vanberg, *Spontaneous Market Order and Social Rules*, in Witt (ed.), *supra* note 33, at 482.

private law are to the same extent touched by the unification process, is insightful for what public policy should entail in this field. To adopt some European directive or regulation in the field of property law appears for example to be too costly because of the strong path dependence in this area of the law.

What is perhaps the most important outcome of evolutionary theory applied to the law, is that the coming into being of a uniform law for Europe will to a large extent be the result of the emergence of a *spontaneous order* that has not so much to do with a deliberate enactment of law by some Sovereign, but much more with a “cultural evolution”. As Hayek<sup>82</sup> puts it: culture is not rationally designed, but a tradition of “rules of conduct” that are passed on through cultural transmission in a process that is not consciously planned. A system of rules should primarily be looked at as a spontaneous order that emerges in response to its environment. In this sense, the whole venture of creating a common European market automatically invokes a new, partly unintended, legal system.

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<sup>82</sup> *Id.*, at 66.